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June 15, 1992

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**ORIGINAL
FILE**

**Ms. Donna Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554**

Re: MM Docket No. 92-51 (FCC 92-96)

Dear Ms. Searcy:

On June 12, 1992, Jones Spacelink Opportunities, Inc. filed its comments in the above-referenced Notice of Proposed Rulemaking and Notice of Inquiry. Copies of the enclosed statute were inadvertently not included with the comments as an attachment. Please associate the enclosed copies of the attachments with the comments.

Sincerely yours,


Peter H. Feinberg
Counsel for Jones
Spacelink Opportunities, Inc.

PHF/cmd

Enclosures

No. of Copies rec'd
List A B C D E

0+4

DELAWARE BUSINESS TRUST ACT

Chapter 38: Treatment of Delaware Business Trusts
Sections 3801. - 3819

Attachment

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(3) There shall be no presumption that a fee schedule filed under paragraph (1) of this subsection is any more or less reasonable than the schedule promulgated under paragraph (2) of this subsection. (67 Del. Laws, c. 56, § 2.)

§ 3562. Judicial review of trustees' allowances.

(a) The provisions of subsection (b)(1)c. of § 3561 of this title notwithstanding, the settlor or any current income beneficiary of a trust, or any other person having an equitable interest in a trust from which a fee for trustee compensation is taken or is proposed to be taken pursuant to subsection (b) of § 3561 of this title, who objects to a schedule or formula filed thereunder as being unreasonable, or who objects to the fee fixed by such schedule or formula as being unreasonable in the particular circumstances, may petition the Court of Chancery for judicial review of the reasonableness of the schedule or formula, or of its application, as the case may be.

(b) Upon the filing of any such petition, the Court of Chancery may appoint a disinterested third person to act as master to hear and determine the matters raised by such petition and any answer thereto. Proceedings before such master shall be in conformance with the Rules of the Court of Chancery. The final report of the master shall be in the form of findings of fact, conclusions of law and recommended decree, and shall be filed with the Register in Chancery. Findings of fact made by the master, if supported by substantial evidence, shall be conclusive. The Court of Chancery shall thereafter enter its decree determining the matter in issue. Costs of the proceeding, including the reasonable fee of the master, shall be assessed against the trust in question if the petition is denied in its entirety and shall be assessed against the trustee in its individual capacity if it is granted in whole. In other instances, costs shall be apportioned equitably. (67 Del. Laws, c. 56, § 2.)

CHAPTER 38. TREATMENT OF DELAWARE BUSINESS TRUSTS

Sec.	Sec.
3801. Definitions.	3810. Certificate of trust; amendment; cancellation.
3802. Prohibition against banking and insurance business.	3811. Execution of certificate.
3803. Liability of beneficial owners and trustees.	3812. Filing of certificate.
3804. Legal proceedings.	3813. Fees.
3805. Rights of beneficial owners in trust property.	3814. Use of names regulated.
3806. Management of business trust.	3815. Merger and consolidation.
3807. Trustee in State.	3816. Derivation actions.
3808. Existence of business trust.	3817. Indemnification.
3809. Applicability of trust law.	3818. Reserved power of State to amend or repeal chapter.
	3819. Short title.

Revisor's note. — Section 2 of 66 Del. Laws, c. 279, provides: "If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable."

Section 3 of 66 Del. Laws, c. 279, provides: "This act shall become effective on Oct. 1, 1988 with respect to business trusts created on or after such date. This act shall have no effect on the validity, powers, rights or liabilities of

common law business trusts created before or after Oct. 1, 1988, or the trustees or beneficiaries thereof. Common law business trusts created before or after Oct. 1, 1988, may elect to be governed by the provisions of this act upon the filing of a certificate of trust, provided, however, a common law business trust created before Oct. 1, 1988, shall not be governed by the provisions of this act to the extent of any inconsistent provisions contained in its governing instrument and not thereafter modified by amendment."

§ 3801. Definitions.

(a) "Business trust" means an unincorporated business association which (i) is created by a trust instrument under which property is held, managed, administered, controlled, invested, reinvested and/or operated, or business or professional activities for profit are carried on, by a trustee or trustees for the benefit of such person or persons as are or may become entitled to a beneficial interest in the trust property, including but not limited to a trust of the type known at common law as a "business trust," or "Massachusetts trust," or a trust qualifying as a real estate investment trust under § 856 et seq., of the United States Internal Revenue Code of 1986 [26 U.S.C. § 856 et seq.], as amended, or under any successor provision, or a trust qualifying as a real estate mortgage investment conduit under § 860D of the United States Internal Revenue Code of 1986 [26 U.S.C. § 860D], as amended, or under any successor provision, and (ii) files a certificate of trust pursuant to § 3810 of this title. Any such association heretofore or hereafter organized shall be a business trust and a separate legal entity.

(b) "Beneficial owner" means any owner of a beneficial interest in a business trust, the fact of ownership to be determined and evidenced (whether by means of registration, the issuance of certificates or otherwise) in conformity to the applicable provisions of the governing instrument of the business trust.

(c) "Trustee" means the person or persons appointed as a trustee in accordance with the governing instrument of a business trust to manage the business and affairs of such business trust, and may include the beneficial owners or any of them.

(d) "Person" means a natural person, partnership, limited partnership, trust, estate, association, corporation, custodian, nominee or any other individual or entity in its own or any representative capacity.

(e) "Other business entity" means a corporation, a partnership (whether general or limited), a common-law trust or any other unincorporated business, excluding a business trust.

(f) "Governing instrument" means a trust instrument which creates a business trust and provides for the governance of the affairs of the business trust and the conduct of its business. A governing instrument:

(1) May provide that a person shall become a beneficial owner and shall become bound by the governing instrument if such person (or a

representative authorized by such person orally, in writing or by other action such as payment for a beneficial interest) complies with the conditions for becoming a beneficial owner set forth in the governing instrument or any other writing and acquires a beneficial interest; and

(2) May consist of 1 or more agreements, instruments or other writings and may include or incorporate bylaws containing provisions relating to the business of the business trust, the conduct of its affairs and its rights or powers or the rights or powers of its trustees, beneficial owners, agents or employees. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, §§ 3, 9, 16.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, in (c), substituted "Trustee" for "Trustees," "appointed as a trustee in accordance with" for "named in" and "a business trust" for "the business trust"; and added (e) and (f).

§ 3802. Prohibition against banking and insurance business.

A business trust may carry on any lawful business or purposes with the exception of the business of granting policies of insurance, or assuming insurance risk or banking as defined in § 126 of Title 8. (66 Del. Laws, c. 279, § 1.)

§ 3803. Liability of beneficial owners and trustees.

(a) Except to the extent otherwise provided in the governing instrument of the business trust, the beneficial owners shall be entitled to the same limitation of personal liability extended to stockholders of private corporations for profit.

(b) Except to the extent otherwise provided in the governing instrument of a business trust, a trustee, when acting in such capacity, shall not be personally liable to any person other than the business trust or a beneficial owner for any act, omission or obligation of the business trust or any trustee thereof. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, §§ 1, 2.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, added (b).

§ 3804. Legal proceedings.

A business trust may sue and be sued, and service of process upon 1 of the trustees shall be sufficient. In furtherance of the foregoing, a business trust may be sued for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, in the performance of their respective duties under the governing instrument of the business trust, and for any damages to persons or property resulting from the negligence of such trustees or agents acting in the performance of such

respective duties. The property of a business trust shall be subject to attachment and execution as if it were a corporation, subject to § 3502 of Title 10. Notwithstanding the foregoing provisions of this section, in the event that the governing instrument of a business trust which is a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. §§ 80a-1 et seq.), creates 1 or more series as provided in § 3806(b)(2) of this title, and if separate and distinct records are maintained for any such series and the assets associated with any such series are held and accounted for separately from the other assets of the business trust, or any other series thereof, and if the governing instrument so provides, and notice of the limitation on liabilities of a series as referenced in this sentence is set forth in the certificate of trust of the business trust, then the debts, liabilities, obligations and expenses incurred, contracted for or otherwise existing with respect to a particular series shall be enforceable against the assets of such series only, and not against the assets of the business trust generally; provided, that § 3803(a) of this title, insofar as it establishes limitations on liability of beneficial owners, shall have no application to liabilities, if any, of beneficial owners arising by reason of the ownership of beneficial interests in any series as to which the governing instrument of the business trust and the certificate of trust provide for the limitations on liabilities among series set forth in this sentence, and the liabilities of such beneficial owners, if any, arising with respect to the ownership of such beneficial interests shall, in accordance with § 3809 of this title, be determined under the laws of this State pertaining to trusts, including the common law (without reference to § 3803(a) of this title). (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 18.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

ture of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, added the last sentence.

§ 3805. Rights of beneficial owners in trust property.

(a) Except to the extent otherwise provided in the governing instrument of the business trust, a beneficial owner shall have an undivided beneficial interest in the property of the business trust and shall share in the profits and losses of the business trust in the proportion (expressed as a percentage) of the entire undivided beneficial interest in the business trust owned by such beneficial owner. The governing instrument of a business trust may provide that the business trust or the trustees, acting for and on behalf of the business trust, shall be deemed to hold beneficial ownership of any income earned on securities of the business trust issued by any business entities formed, organized, or existing under the laws of any jurisdiction, including the laws of any foreign country.

(b) No creditor of the beneficial owner shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the business trust.

(c) A beneficial owner's beneficial interest in the business trust is personal property notwithstanding the nature of the property of the trust.

(d) A beneficial owner's beneficial interest in the business trust is freely transferable except to the extent otherwise provided in the governing instrument of the business trust. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, §§ 6, 10, 17.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, in (a), deleted "as

set forth in the records maintained by the trustees" at the end of the first sentence, and added the second sentence; and deleted "nor shall the death, incapacity, dissolution, termination or bankruptcy of any beneficial owner be cause for the termination or dissolution of the business trust" at the end of (b); and made a minor stylistic change.

§ 3806. Management of business trust.

(a) The business and affairs of a business trust shall be managed by or under the direction of its trustees. To the extent provided in the governing instrument of a business trust, any person (including a beneficial owner) shall be entitled to direct the trustees in the management of a business trust. Except to the extent otherwise provided in the governing instrument of a business trust, neither the power to give direction to a trustee nor the exercise thereof by any person (including a beneficial owner) shall cause such person to be a trustee.

(b) A governing instrument may contain any provision relating to the management of the business and affairs of the business trust, and the rights, duties and obligations of the trustees, beneficial owners and other persons, which is not contrary to any provision or requirement of this chapter and, without limitation:

(1) May provide for classes, groups or series of trustees or beneficial owners, or classes, groups or series of beneficial interests, having such relative rights, powers and duties as the governing instrument may provide, and may make provision for the future creation in the manner provided in the governing instrument of additional classes, groups or series of trustees, beneficial owners or beneficial interests, having such relative rights, powers and duties as may from time to time be established, including rights, powers and duties senior or subordinate to existing classes, groups or series of trustees, beneficial owners or beneficial interests;

(2) May establish or provide for the establishment of designated series of trustees, beneficial owners or beneficial interests having separate rights, powers or duties with respect to specified property or obligations of the business trust or profits and losses associated with specified property or obligations, and, to the extent provided in the governing instrument, any such series may have a separate business purpose or investment objective;

(3) May provide for the taking of any action, including the amendment of the governing instrument, the accomplishment of a merger or consoli-

dation, the appointment of one or more trustees, the sale, lease, exchange, transfer, pledge or other disposition of all or any part of the assets of the business trust or the assets of any series, or the dissolution of the business trust, or may provide for the taking of any action to create under the provisions of the governing instrument a class, group or series of beneficial interests that was not previously outstanding, in any such case without the vote or approval of any particular trustee or beneficial owner, or class, group or series of trustees or beneficial owners;

(4) May grant to (or withhold from) all or certain trustees or beneficial owners, or a specified class, group or series of trustees or beneficial owners, the right to vote, separately or with any or all other classes, groups or series of the trustees or beneficial owners, on any matter, such voting being on a per capita, number, financial interest, class, group, series or any other basis;

(5) May, if and to the extent that voting rights are granted under the governing instrument, set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on, waiver of any such notice, action by consent without a meeting, the establishment of record dates, quorum requirements, voting in person, by proxy or in any other manner, or any other matter with respect to the exercise of any such right to vote; or

(6) May provide for the present or future creation of more than 1 business trust, including the creation of a future business trust to which all or any part of the assets, liabilities, profits or losses of any existing business trust will be transferred, and for the conversion of beneficial interests in an existing business trust, or series thereof, into beneficial interests in the separate business trust, or series thereof. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 4.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, rewrote the section.

§ 3807. Trustee in State.

(a) Every business trust shall at all times have at least 1 trustee which, in the case of a natural person, shall be a person who is a resident of this State or which, in all other cases, has its principal place of business in this State.

(b) Notwithstanding the provisions of subsection (a) of this section, if a business trust is or becomes a registered investment company under the Investment Company Act of 1940, as amended (15 U.S.C. § § 80a-1 et seq.), such business trust shall not be required to have a trustee who is a resident of this State or who has a principal place of business in this State if and for so long as such business trust shall have and maintain in this State:

(1) A registered office, which may but need not be a place of business in this State; and

(2) A registered agent for service of process on the business trust, which agent may be either an individual resident in this State whose

business office is identical with such business trust's registered office, or a domestic corporation, or a foreign corporation authorized to transact business in this State, having a business office identical with such registered office.

(c) Any business trust maintaining a registered office and registered agent in this State under subsection (b) of this section may change the location of its registered office in this State to any other place in this State, or may change the registered agent to any other person or corporation (meeting the requirements contained in subsection (b) of this section), by filing an amendment to its certificate of trust in accordance with the applicable provisions of this chapter. If a business trust which is an investment company registered as aforesaid maintains a registered office and registered agent in this State as herein provided, then the reference in § 3810(a)(2) of this title to the "name and the business address of at least 1 of the trustees meeting the requirements of § 3807 of this title" shall be deemed a reference to the name and the business address of the registered agent and registered office maintained under this section, and the certificate of trust filed under § 3810 of this title shall reflect such information in lieu of the information otherwise required by § 3810(a)(2) of this title.

(d) Service of process upon a registered agent maintained by a business trust pursuant to subsection (b) of this section shall be as effective as if served upon one of the trustees of the business trust pursuant to § 3804 of this title. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 5.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, rewrote the section.

§ 3808. Existence of business trust.

(a) Except to the extent otherwise provided in the governing instrument of the business trust, the business trust shall have perpetual existence.

(b) Except to the extent otherwise provided in the governing instrument of a business trust, the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner shall not result in the termination or dissolution of a business trust. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 7.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, added (b).

§ 3809. Applicability of trust law.

Except to the extent otherwise provided in the governing instrument of a business trust or in this chapter, the laws of this State pertaining to trusts are hereby made applicable to business trusts; provided however, that for purposes of taxation under Title 30 a business trust shall be classified as a corpo-

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ration, an association, a partnership, a trust or otherwise, as shall be determined under the United States Internal Revenue Code of 1986, as amended, or under any successor provision. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 11.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, rewrote the section.

§ 3810. Certificate of trust; amendment; cancellation.

(a)(1) Every business trust shall file a certificate of trust in the office of the Secretary of State. The certificate of trust shall set forth:

- a. The name of the business trust;
- b. The name and the business address of at least 1 of the trustees meeting the requirements of § 3807 of this title;
- c. The future effective date or time (which shall be a date or time certain) of effectiveness of the certificate if it is not to be effective upon the filing of the certificate; and
- d. Any other information the trustees determine to include therein.

(2) The filing of a certificate of trust in the office of the Secretary of State shall make it unnecessary to file any other documents under Chapter 31 of Title 6.

(b)(1) A certificate of trust may be amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate of amendment shall set forth:

- a. The name of the business trust;
- b. The amendment to the certificate; and
- c. The future effective date or time (which shall be a date or time certain) of effectiveness of the certificate if it is not to be effective upon the filing of the certificate.

(2) A certificate of trust may be amended at any time for any purpose as the trustees may determine. A trustee who becomes aware that any statement in a certificate of trust was false when made or that any matter described has changed making the certificate false in any material respect, shall promptly file a certificate of amendment.

(c) A certificate of trust shall be cancelled upon the completion of winding up of the business trust and its termination. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

- (1) The name of the business trust;
- (2) The date of filing of its certificate of trust;
- (3) The future effective date or time (which shall be a date or time certain) of cancellation if it is not to be effective upon the filing of the certificate; and
- (4) Any other information the trustee determines to include therein.

(66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 12.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, rewrote (a) and (b).

§ 3811. Execution of certificate.

(a) Each certificate required by this chapter to be filed in the office of the Secretary of State shall be executed in the following manner:

(1) A certificate of trust must be signed by all of the trustees;

(2) A certificate of amendment must be signed by at least one of the trustees;

(3) A certificate of cancellation must be signed by all of the trustees or as otherwise provided in the governing instrument of the business trust; and

(4) If a business trust is filing a certificate of merger or consolidation, the certificate of merger or consolidation must be signed by all of the trustees or as otherwise provided in the governing instrument of the business trust, or if the certificate of merger or consolidation is being filed by another business entity, the certificate of merger or consolidation must be signed by a person authorized to execute such instrument on behalf of such other business entity.

(b) The execution of a certificate by a trustee constitutes an oath or affirmation, under the penalties of perjury in the third degree, that, to the best of the trustee's knowledge and belief, the facts stated therein are true. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 13.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, rewrote (a).

§ 3812. Filing of certificate.

(a) The original signed copy, together with a duplicate copy, which may be either a signed or conformed copy, of the certificate of trust and any certificates of amendment or cancellation or any certificate of merger or consolidation shall be delivered to the Office of the Secretary of State. Unless the Secretary of State finds that any certificate does not conform to law, upon receipt of all filing fees required by law he shall:

(1) Certify that the certificate of trust, the certificate of amendment, the certificate of cancellation or the certificate of merger or consolidation has been filed in his office by endorsing upon the original certificate the word "Filed", and the date and hour of the filing. This endorsement is conclusive of the date and time of its filing in the absence of actual fraud;

(2) File and index the endorsed certificate; and

(3) Return the duplicate copy, similarly endorsed, to the person who filed it or his representative.

(b) Upon the filing of a certificate of trust in the Office of the Secretary of State, or upon the future effective date or time of a certificate of trust as

provided for therein, the certificate of trust shall be effective. Upon the filing of a certificate of amendment in the office of the Secretary of State, or upon the future effective date or time of a certificate of amendment as provided for therein, the certificate of trust shall be amended as set forth therein. Upon the filing of a certificate of cancellation or a certificate of merger or consolidation which acts as a certificate of cancellation in the office of the Secretary of State or upon the future effective date or time of a certificate of cancellation or a certificate of merger or consolidation which acts as a certificate of cancellation, as provided for therein, the certificate of trust shall be cancelled.

(c) A fee as set forth in § 3813(a)(2) of this title shall be paid at the time of the filing of a certificate of trust, a certificate of amendment, a certificate of cancellation or a certificate of merger or consolidation.

(d) A fee as set forth in § 3813(a)(3) of this title shall be paid for a certified copy of any paper on file as provided for by this chapter, and a fee as set forth in § 3813(a)(4) of this title shall be paid for each page copied. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 14.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c.

297, effective July 5, 1990, inserted "or any certificate of merger or consolidation" in the first sentence in (a); inserted "or the certificate of merger or consolidation" in (a)(1); rewrote (b); inserted "or a certificate of merger or consolidation" in (c); and made minor stylistic changes.

§ 3813. Fees.

(a) No documents required to be filed under this chapter shall be effective until the applicable fee required by this section is paid. The following fees shall be paid to and collected by the Secretary of State for the use of this State:

(1) Upon the receipt for filing of an application for reservation of name, and application for renewal of reservation, or notice of transfer or cancellation of reservation pursuant to § 3814 of this title, a fee in the amount of \$50.

(2) Upon the receipt for filing of a certificate of trust, a certificate of amendment, a certificate of cancellation or a certificate of merger or consolidation, a fee in the amount of \$100.

(3) For certifying copies of any paper on file as provided for by this chapter, a fee in the amount of \$10 for each copy certified.

(4) For issuing further copies of instruments on file, whether certified or not, a fee in the amount of \$1 per page.

(b) Except as provided by this section, all other fees for the Secretary of State shall be as provided for in § 2315 of Title 29. (66 Del. Laws, c. 279, § 1; 67 Del. Laws, c. 297, § 15.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created."

Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

Effect of amendments. — 67 Del. Laws, c. 297, effective July 5, 1990, in (a)(2), inserted

"or a certificate of merger or consolidation" and made minor stylistic changes.

§ 3814. Use of names regulated.

(a) The name of each business trust as set forth in its certificate of trust must be such as to distinguish it upon the records of the office of the Secretary of State from the name of any corporation, limited partnership or business trust reserved, registered or organized under the laws of this State or qualified to do business or registered as a foreign corporation or foreign limited partnership in this State; provided, however, that a business trust may register under any name which is not such as to distinguish it upon the records of the office of the Secretary of State from the name of any corporation, limited partnership or business trust reserved, registered or organized under the laws of this State or qualified to do business or registered as a foreign corporation or foreign limited partnership in this State with the consent of the other corporation, limited partnership or business trust, which written consent shall be filed with the Secretary of State.

(b) The exclusive right to the use of a name may be reserved by:

(1) Any person intending to form a business trust and to adopt that name; and

(2) Any business trust registered in this State which proposes to change its name.

(c) The reservation of a specified name shall be made by filing with the Secretary of State an application, executed by the applicant, together with a duplicate copy, which may be either a signed or conformed copy, specifying the name to be reserved and the name and address of the applicant. If the Secretary of State finds that the name is available for use by a business trust, he shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may again reserve the same name for successive 120-day periods. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved, together with a duplicate copy, which may be either a signed or conformed copy, specifying the name to be transferred and the name and address of the transferee. The reservation of a specified name may be cancelled by filing with the Secretary of State a notice of cancellation, executed by the applicant or transferee, together with a duplicate copy, which may be either a signed or conformed copy, specifying the name reservation to be cancelled and the name and address of the applicant or transferee. A duplicate copy filed with the Secretary of State as required by this subsection shall be returned by the Secretary of State to the person who filed it or his representative with a notation thereon of the action taken with respect to the original copy thereof by the Secretary of State.

(d) A fee as set forth in § 3813(a)(1) of this title shall be paid at the time of the initial reservation of any name, at the time of the renewal of any such reservation and at the time of the filing of a notice of the transfer or cancellation of any such reservation. (66 Del. Laws, c. 279, § 1.)

§ 3815. Merger and consolidation.

(a) Pursuant to an agreement of merger or consolidation, a business trust may merge or consolidate with or into 1 or more business trusts or other business entities formed or organized or existing under the laws of the State or any other state or the United States or any foreign country or other foreign jurisdiction, with such business trust or other business entity as the agreement shall provide being the surviving or resulting business trust or other business entity. Unless otherwise provided in the governing instrument of a business trust, a merger or consolidation shall be approved by each business trust which is to merge or consolidate by all of the trustees and the beneficial owners of such business trust. In connection with a merger or consolidation hereunder, rights or securities of, or interests in, a business trust or other business entity which is a constituent party to the merger or consolidation may be exchanged for or converted into cash, property, rights or securities of, or interests in, the surviving or resulting business trust or other business entity or, in addition to or in lieu thereof, may be exchanged for or converted into cash, property, rights or securities of, or interests in, a business trust or other business entity which is not the surviving or resulting business trust or other business entity in the merger or consolidation. Notwithstanding prior approval, an agreement of merger or consolidation may be terminated or amended pursuant to a provision for such termination or amendment contained in the agreement of merger or consolidation.

(b) If a business trust is merging or consolidating under this section, the business trust or other business entity surviving or resulting in or from the merger or consolidation shall file a certificate of merger or consolidation in the office of the Secretary of State. The certificate of merger or consolidation shall state:

(1) The name and jurisdiction of formation or organization of each of the business trust or other business entities which is to merge or consolidate;

(2) That an agreement of merger or consolidation has been approved and executed by each of the business trusts or other business entities which is to merge or consolidate;

(3) The name of the surviving or resulting business trust or other business entity;

(4) The future effective date or time (which shall be a date or time certain) of the merger or consolidation if it is not to be effective upon the filing of the certificate of merger or consolidation;

(5) That the executed agreement of merger or consolidation is on file at the principal place of business of the surviving or resulting business trust or other business entity, and shall state the address thereof;

(6) That a copy of the agreement of merger or consolidation will be furnished by the surviving or resulting business trust or other business entity, on request and without cost, to any beneficial owner of any business trust or any person holding an interest in any other business entity which is to merge or consolidate; and

(7) If the surviving or resulting entity is not a business trust or other business entity formed or organized or existing under the laws of the

State of Delaware, a statement that such surviving or resulting other business entity agrees that it may be served with process in the State in any action, suit or proceeding for the enforcement of any obligation of any business trust which is to merge or consolidate, irrevocably appointing the Secretary of State as its agent to accept service of process in any such action, suit or proceeding and specifying the address to which a copy of such process shall be mailed to it by the Secretary of State. In the event of service hereunder upon the Secretary of State, the plaintiff in any such action, suit or proceeding shall furnish the Secretary of State with the address specified in the certificate of merger or consolidation provided for in this section and any other address which the plaintiff may elect to furnish, together with copies of such process as required by the Secretary of State, and the Secretary of State shall notify such surviving or resulting other business entity thereof at all such addresses furnished by the plaintiff by letter, certified mail, return receipt requested. Such letter shall enclose a copy of the process and any other papers served upon the Secretary of State. It shall be the duty of the plaintiff in the event of such service to serve process and any other papers in duplicate, to notify the Secretary of State that service is being made pursuant to this subsection, and to pay the Secretary of State the sum of \$50 for use of the State, which sum shall be taxed as part of the costs in the proceeding, if the plaintiff shall prevail therein. The Secretary of State shall maintain an alphabetical record of any such process setting forth the name of the plaintiff and defendant, the title, docket number and nature of the proceedings in which process has been served upon him, the return date thereof, and the day and hour when the service was made. The Secretary of State shall not be required to retain such information for a period longer than 5 years from his receipt of the service of process.

(c) Any failure to file a certificate of merger or consolidation in connection with a merger or consolidation which was effective prior to July 5, 1990 shall not affect the validity or effectiveness of any such merger or consolidation.

(d) Unless a future effective date or time is provided in a certificate of merger or consolidation, in which event a merger or consolidation shall be effective at any such future effective date or time, a merger or consolidation shall be effective upon the filing in the office of the Secretary of State of a certificate of merger or consolidation.

(e) A certificate of merger or consolidation shall act as a certificate of cancellation for a business trust which is not the surviving or resulting entity in the merger or consolidation.

(f) Notwithstanding anything to the contrary contained in the governing instrument of a business trust, a governing instrument of a business trust containing a specific reference to this subsection may provide that an agreement of merger or consolidation approved in accordance with subsection (a) of this section may:

(1) Effect any amendment to the governing instrument of the business trust; or

(2) Effect the adoption of a new governing instrument of the business trust if it is the surviving or resulting business trust in the merger or consolidation.

Any amendment to the governing instrument of a business trust or adoption of a new governing instrument of the business trust made pursuant to the foregoing sentence shall be effective at the effective time or date of the merger or consolidation. The provisions of this subsection shall not be construed to limit the accomplishment of a merger or consolidation or of any of the matters referred to herein by any other means provided for in the governing instrument of a business trust or other agreement or as otherwise permitted by law, including that the governing instrument of any constituent business trust to the merger or consolidation (including a business trust formed for the purpose of consummating a merger or consolidation) shall be the governing instrument of the surviving or resulting business trust.

(g) When any merger or consolidation shall have become effective under this section, for all purposes of the laws of the State, all of the rights, privileges and powers of each of the business trusts and other business entities that have merged or consolidated, and all property, real, personal and mixed, and all debts due to any of said business trusts and other business entities, as well as all other things and causes of action belonging to each of such business trusts and other business entities, shall be vested in the surviving or resulting business trust or other business entity, and shall thereafter be the property of the surviving or resulting business trust or other business entity as they were of each of the business trusts and other business entities that have merged or consolidated, and the title to any real property vested by deed or otherwise, under the laws of the State, in any of such business trusts and other business entities, shall not revert or be in any way impaired by reason of this chapter; but all rights of creditors and all liens upon any property of any of said business trusts and other business entities shall be preserved unimpaired, and all debts, liabilities and duties of each of the said business trusts and other business entities that have merged or consolidated shall thenceforth attach to the surviving or resulting business trust or other business entity, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it. (67 Del. Laws, c. 297, § 8.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with respect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

§ 3816. Derivation actions.

(a) A beneficial owner may bring an action in the Court of Chancery in the right of a business trust to recover a judgment in its favor if trustees with authority to do so have refused to bring the action or if an effort to cause those trustees to bring the action is not likely to succeed.

(b) In a derivative action, the plaintiff must be a beneficial owner at the time of bringing the action:

(1) At the time of the transaction of which he complains; or

(2) His status as a beneficial owner had devolved upon him by operation of law or pursuant to the terms of the governing instrument of the

business trust from a person who was a beneficial owner at the time of the transaction.

(c) In a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by the trustees, or the reasons for not making the effort.

(d) If a derivative action is successful, in whole or in part, or if anything is received by a business trust as a result of a judgment, compromise or settlement of any such action, the Court may award the plaintiff reasonable expenses, including reasonable attorney's fees. If anything is so received by the plaintiff, the Court shall make such award of plaintiff's expenses payable out of those proceeds and direct plaintiff to remit to the business trust the remainder thereof, and if those proceeds are insufficient to reimburse plaintiff's reasonable expenses, the Court may direct that any such award of plaintiff's expenses or a portion thereof be paid by the business trust. (67 Del. Laws, c. 297, § 8.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with re-

spect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

§ 3817. Indemnification.

(a) Subject to such standards and restrictions, if any, as are set forth in the governing instrument of a business trust, a business trust shall have the power to indemnify and hold harmless any trustee or beneficial owner or other person from and against any and all claims and demands whatsoever.

(b) The absence of a provision for indemnity in the governing instrument of a business trust shall not be construed to deprive any trustee or beneficial owner or other person of any right to indemnity which is otherwise available to such person under the laws of this State. (67 Del. Laws, c. 297, § 8.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with re-

spect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

§ 3818. Reserved power of State to amend or repeal chapter.

All provisions of this chapter may be altered from time to time or repealed and all rights of business trusts, trustees, beneficial owners and other persons are subject to this reservation. (67 Del. Laws, c. 297, § 8.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with re-

spect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

§ 3819. Short title.

This chapter may be cited as the "Delaware Business Trust Act." (67 Del. Laws, c. 297, § 8.)

Revisor's note. — Section 19 of 67 Del. Laws, c. 297, provides: "This act shall become effective immediately upon enactment with re-

spect to all business trusts whenever created." Chapter 297 became effective upon the signature of the Governor on July 5, 1990.

CHAPTER 39. GUARDIAN AND WARD

Subchapter I. Appointment, Bond and Tenure of Guardian

§ 3914. Guardian for person or property of aged, mentally infirm or physically incapacitated persons.

Every petition for the appointment of a guardian involves three principal questions: (1) Is the proposed ward "unable properly to manage and care for his person"; (2) is such inability "a result of advanced age or mental infirmity or physical incapacity"; and (3) is the proposed ward, as a consequence, "in danger of substantially endangering his health." In re Garrett, Del. Ch., 547 A.2d 609 (1988).

Guardianship was appropriate to prevent

self inflicted harm to a prisoner facing long term incarceration where the court found that there was some basis to hope that the desire to die would pass away, and even though the prisoner appeared rational, there was also some basis to conclude that his response to the conditions of his life was so extreme as to fall beyond the range of decisions that a healthy mind would make in these or similar circumstances. In re Garrett, Del. Ch., 547 A.2d 609 (1988).